81-2152

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In The
Supreme Court of the United States

OCTOBER TERM, 1981

No.

IRWIN WASSERMAN, et al.,
Petitioners,

v.

SYLVIA WASSERMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1981

No. _____

IRWIN WASSERMAN, et al.,

Petitioners,

v.

SYLVIA WASSERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.[1]

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[1]The parties to the proceeding before the Fourth Circuit were Sylvia Wasserman, Appellant, and Irwin Wasserman, Arlene Cornblatt Wasserman, Jacob Wasserman, Helen Ann Wasserman, Irwin Liptz, Armand Robinson, Murray Kivitz, and the partnership of Kivitz, Robinson & Liptz, Appellees.

QUESTION PRESENTED

Did the Court of Appeals err in holding that a federal court had jurisdiction to resolve a case alleging liability for child enticement, intentional infliction of emotional distress and conspiracy to remove, etc., where the claims arise from a domestic relations dispute and where federal courts have traditionally excluded such conflicts from diversity jurisdiction?

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals in this case appears at 671 F.2d 837 (1982). The memorandum opinion of the District Court for the District of Maryland appears at page A-1 of the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on February 24, 1982. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

STATEMENT OF THE CASE

On July 30, 1980, Sylvia Wasserman filed an action in the United States District Court for the District of Maryland seeking compensatory and punitive damages against Irwin Wasserman, her former husband,

and against his present wife, both his parents, his three attorneys and the law firm representing him in the Wassermans' divorce and child custody proceedings for the alleged wrongful removal of three of the four Wasserman children from her custody. Her three count complaint alleged child enticement, intentional infliction of emotional distress, and civil conspiracy to remove the children from her and interfere with her relationship with them. Mrs. Wasserman asserted federal diversity jurisdiction based on her California citizenship and the Maryland citizenship of all the defendants.

The jugular facts of this case where the husband took the children were litigated in the state court prior to this action. The father was incarcerated, fined, and had his future visitation rights subjected to a new exeat bond.

The facts on which Mrs. Wasserman bases her child enticement, infliction of emotional distress, and conspiracy counts are those relating to these alleged violations of the child custody order of the state court when the husband took the children from Maryland to California. There were two years of litigation in the state court. The matters were fully litigated between the parents, decisions were entered by the state court, and the litigation was completed and finished. Now the plaintiff attempts to bring the identical problem to the Federal Court. There are no new facts that were not considered by the state court. The only new element is that the husband's second wife, the husband's parents, and the husband's attorneys are now added as co-defendants.

All defendants filed Motions to Dismiss asserting lack of subject matter

jurisdiction because the child custody dispute at the heart of each of the counts in the complaint brought all the issues raised within the domestic relations exception to federal diversity jurisdiction. These motions were granted after hearing by memcrandum order on May 12, 1981, the judge finding the counts, though alleging intentional torts, to be fundamentally a domestic squabble over child custody and parent-child relations.

Mrs. Wasserman filed an appeal from this decision to grant the motions to dismiss in the Fourth Circuit Court of Appeals. The Fourth Circuit reversed the lower court's decision on February 24, 1982. It is from this decision that this appeal is taken by petitioners Irwin Wasserman, Arlene C. Wasserman, Jacob Wasserman, and Helen Ann Wasserman.

REASONS FOR GRANTING THE WRIT

1. Inconsistency in Circuit Court decisions. The decision below creates a direct conflict with the prior decisions of this court and the decisions of four other Circuit Courts of Appeals on the same matter of law relating to the exemption of domestic relations issues including custody disputes from federal diversity jurisdiction. The varying decisions of another Circuit Court reflect an internal conflict. This nationwide conflict and confusion among and within circuits can only be reconciled by this Court.

The question whether federal diversity jurisdiction may lie in cases dealing with child custody disputes and domestic relations issues has been previously considered by this Court in In re Burrus, 136 U.S. 586 (1890) and Barber v. Barber, 62 U.S. (21 How.) 582 (1858). This Court held

that there is no federal jurisdiction over such issues.

The First, Third, Sixth, and Eighth Circuits have all subsequently considered this question and have held that there can be no federal jurisdiction in diversity cases involving domestic relations and child custody disputes. See Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) (a complaint of civil rights violation based on disobeying a custody order); Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975) (a complaint of breach of contract under a separation agreement involving custody); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973), appeal dismissed, 414 U.S. 805 (1973) (a suit for perjury, conversion, and malicious prosecution in a divorce proceeding); Overman v. United States, 563 F.2d 1287 (8th Cir. 1977) (an injunction to garnish wages for alimony and child support).

The Fifth Circuit has considered in two cases whether to find jurisdiction over such matters and has held differently in each. In the first, Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) federal jurisdiction was upheld in a breach of contract of a voluntary separation agreement. In Jagiella v. Jagiella, 647 F.2d 565 (5th Cir. 1981), federal jurisdiction was denied in a suit for support arrearages, mental anguish, alienation of affection and visitation.

2. An important legal question. The decision below usurps from the states one area of law historically under exclusive state jurisdiction, that relating to family disputes. As a result, the decision below is in direct conflict with this Court's increased deference to state administration, adjudication, and jurisdiction.

Areas of judicial consideration to which this Court has recently given the states preemptive jurisdiction include state institutional reform, Pennhurst State School v. Halderman, 101 S.Ct 1531 (1981); civil attachment proceedings, Trainor v. Hernandez, 431 U.S. 434 (1977); title to land changed by navigable rivers, Oregon v. Corvallis Sand & Gravel Co, 429 U.S. 363 (1977); habeas corpus relief, Stone v. Powell, 428 U.S. 465 (1976); injunctions against state officials, Rizzo v. Goode, 423 U.S. 362 (1976); and state agency administrative decisions, National League of Cities v. Usery, 426 U.S. 833 (1976).

Some matters previously preempted by federal jurisdiction have by recent decisions been deferred to the states by this Court such as intellectual property, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977);

employment regarding illegal aliens, De Camas v. Bria, 424 U.S. 35 (1976); and anti-pollution regulations, Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

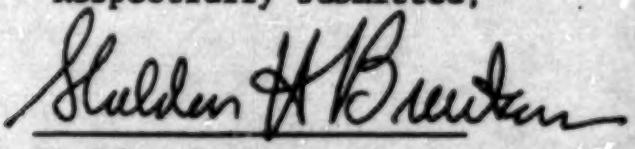
For a more comprehensive list of this Court's decisions to give deference to state jurisdiction in a wide variety of subjects, see Weinberg, "New Judicial Federalism", 29 STANFORD L. REV. 1191, 1193 n.10 (1977); and Gibbons, "Our Federalism", 12 SUFFOLK U.L. REV. 1087, 1113 (1978).

The decision below, instead of fostering a deference to the states, effectively eliminates state jurisdiction over an area traditionally governed exclusively by state law. The conflict this restriction of state jurisdiction causes with this Court's decision to augment state court jurisdiction should be conclusively determined.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted and the judgment of the United States Court of Appeals for the Fourth Circuit reversed.

Respectfully submitted,



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IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

SYLVIA WASSERMAN :

v. : Civil No. HM80-1988

IRWIN WASSERMAN, :
et al.

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M E M O R A N D U M

Plaintiff Sylvia Wasserman has brought this action against her ex-husband, Irwin Wasserman, other members of the Wasserman family, and three attorneys, Irwin Liptz, Armand Robinson and Murray Kivitz. Count I of the complaint alleges that Irwin Wasserman removed three of the four Wasserman children from Plaintiff's rightful custody with the full knowledge and connivance of the other defendants, that this was done with full awareness by defendants of plaintiff's lack of consent, and that defendants prevented said children from contacting plaintiff by any

means and endeavored to conceal the children's whereabouts from plaintiff. Count II alleges that defendants engaged in this conduct in order to interfere with the parent-child relationship of plaintiff with the children and to prejudice plaintiff's position as a litigant in a pending divorce proceeding (at that time) by forcing plaintiff into a settlement, all of which resulted in a considerable pecuniary loss to plaintiff and physical and psychological distress as well. Count III charges the defendants with civil conspiracy to interfere with the rightful and lawful relationship between plaintiff and the three children "by unlawful means when the minor children of the plaintiff were by force, persuasion and false pretenses abducted and enticed away from the plaintiff, who at the time of this occurrence, had the lawful and sole custody of the three minor children. . . ."

Compl. para. 13. The commplaint also asserts that, pursuant to a decree of the Circuit Court for Montgomery County dated June 8, 1976, sole custody of all four children was granted to the plaintiff, during the pendency of the aforementioned divorce proceedings, which resulted in a decree of divorce dated June 8, 1978.

Defendants have moved to dismiss the complaint on various grounds, the principal contention being lack of subject matter jurisdiction in the federal court. The complaint, although erroneously asserting 28 U.S.C. §§ 1331 and 1391 as jurisdictional bases, is really brought under the diversity provision, 28 U.S.C.§ 1332. The thrust of defendants' motions to dismiss is the by now well-settled principle that federal courts should be reluctant to exercise jurisdiction in cases involving domestic relations, even though diversity of citizenship exists. This exception

to the diversity jurisdiction is not statutory in origin, but is rather a judge-made doctrine stemming from two nineteenth century decisions of the Supreme Court.

In dicta contained in the opinion of the Court in Barber v. Barber, 62 U.S. 582, 584 (1859), the Supreme Court stated that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony incident to divorce. The second case, In re Burrus, 136 U.S. 586 (1890) involved, as does the case at bar, a dispute over child custody, and the Court therein stated, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." Id. at 593-94.

Subsequent decisions in the lower federal courts have construed Barber and Burrus as prohibiting federal jurisdiction in domestic relations cases in general,

and child custody cases in particular. See, e.g., Delavigne v. Delavigne, 402 F. Supp. 363, 366 (D. Md. 1975), aff'd, 530 F.2d 598 (4th Cir. 1976); Cherry v. Cherry, 438 F. Supp. 88, 89-90 (D. Md. 1977). See also Wilkins v. Rogers, 581 F.2d 399, 403-04 (4th Cir. 1978); Spindel v. Spindel, 283 F. Supp. 797 (E.D. N.Y. 1968) (setting forth, in detail, the history of the domestic relations exception); 13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3609 (1975 & Supp. 1980).

The principles underlying the domestic relations exception are judicially sound. We begin, of course, with Justice Holmes' observation in Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930):

> If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is little difficulty in construing the instrument accordingly. . . .

After discussing the Supreme Court decisions in detail, the Third Circuit Court of Appeals in Solomon v. Solomon, 516 F.2d 1018, 1024-25 (1975) said:

> Our understanding of these cases requires us to conclude that the district court properly refused to exercise jurisdiction over the instant case. The import of the Supreme Count's language in these cases is that the federal courts do not have jurisdiction in domestic relations suits except where necessary to the effectuation of prior state court judgments involving the same matters or where jurisdiction lies by dint of the participation and review of territorial courts. . . .
>
> * * * *
>
> In holding that the domestic relations doctrine applies to the case before us, we do not mean to suggest that a separation agreement may never be litigated in the federal courts by parties between whom there is diversity of citizenship. In a different case, in which the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts,

> and in which there was no threat that a feuding couple would play one court system off against the other, we might well assume jurisdiction. . . .
>
> The domestic relations exception to the jurisdictional powers of federal courts represents an historically engrained limitation upon us. It is true that the rationale upon which it is premised has shifted from conceptions regarding the powers of ancient ecclesiastical courts, . . .the non-diversity of married couples and the lack of monetary value of a divorce, . . .to the modern view that state courts have developed both a well-known expertise in these cases and a strong interest in disposing of them. See C. Wright, Handbook of the Law of Federal Courts 84 (2d ed. 1970) . . . (Emphasis supplied)

Yet another equally valid underlying justification for the domestic relations exception is the efficient administration of justice in federal courts. Our court of appeals has recently noted, in Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980), the concerns expressed by other district judges within this circuit, such as that

which motivated Chief Judge Northrop, in Cherry v. Cherry, supra, to refuse "to increase the workload of this already overburdened court by ignoring a rule that has existed for over 100 years without any intimation of Congressional disapproval", or the concern that gave rise to the following observations by Judge Hemphill in Thrower v. Cox, 425 F. Supp 570, 573 (D.S.C. 1976):

> Domestic relations matters, such as divorce and child custody, are very common types of litigation which, even with the diversity requirements, would greatly increase the workload of an already overburdened court system. The nature of domestic relations law is such that this is not merely a recapitulation of the old "floodgates" argument. In granting alimony and deciding matters of child custody, the court must retain jurisdiction and freqeuntly reconsider the case to determine if changed circumstances warrant a change in the original decree. This requires constant supervision of the court, Additionally, in order to perform the job adequately, state family courts out of necessity

> frequently work in close conjunction with social welfare agencies which assist them in carrying out their functions. Such assistance is not presently available in the federal system, nor do we need to create an additional bureaucracy to needlessly complicate these state services. Perhaps the most convincing evidence that the federal courts should refuse jurisdiction in this area is the state's own treatment of this type of litigation. The field of domestic relations is so vexatious, timeconsuming and specialized that virtually every state in the Union has established a separate system of family courts to prevent their own trial courts from being overburdened. As it has done consistently in the past, the federal court system should allow them that dubious honor exclusively.

The federal-court cases cited by plaintiff do not alter the correctness of these principles. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) was a decision of Judge Thomsen in a case brought under the Alien Tort Statute, 28 U.S.C. § 1350; in that case, Judge Thomsen weighed the above-mentioned prudential considerations against the

palpable federal interest in adjudicating questions of nationality and entry into the United States, as well as relations with the foreign nation of which the plaintiff was a domiciliary. In contrast, the issue of domestic relations exception was not even considered by the court in Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D. N.Y. 1978), but insofar as the court's silence in that case can reasonably be interpreted as a contrary result, this court declines to follow it, particularly in the light of a decision by the circuit court which holds dominion over the district in which Kajtazi was decided adopting the position taken herein. Hernstadt v. Hernstadt, 373 F.2d 316 (2d Circ. 1967).

The case at bar, though couched in terms of a series of intentional torts, is fundamentally concerned with alleged abridgment of the parent-child relationship. Permitting actions such as this to

be maintained in a federal court sitting in diversity would invite any party to a domestic squabble to render the domestic relations exception a nullity merely by deft turns of phrase and ingenious legal theories. This court will not countenance such a result.

For the foregoing reasons, this court will grant the motions to dismiss for lack of subject matter jurisdiction.

Dated: May , 1981

United States District Judge

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

SYLVIA WASSERMAN :

v. : Civil No. HM80-1988

IRWIN WASSERMAN :
et al.

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O R D E R

For the reasons outlined in the foregoing memorandum, it is this ____ day of May 1981, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendants' motion to dismiss for lack of subject matter jurisdiction be, and the same hereby is, Granted; and

(2) that the Clerk of the Court mail copies of this memorandum and order to Counsel for the parties.

United States District Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-1591

Sylvia Wasserman,

Appellant,

vs.

Irwin Wasserman, et al.,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Herbert F. Murray, District Judge.

Argued January 4, 1982 Decided February 24, 1982

Before WINTER, Chief Judge, BUTZNER, Circuit Judge, and INGRAHAM,* Senior Circuit Judge.

(Stuart M. Salsbury, Israelson & Jackson, P.A. on brief) for Appellant; (Nell B. Strachan, James K. Archibald; Sheldon H. Braiterman; Armand Robinson on brief) for Appellees.

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*Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

INGRAHAM, Circuit Judge:

Sylvia Wasserman appeals from the dismissal of a diversity suit against her former husband and other defendants in which she had alleged the defendants removed, or assisted in removing, her children from her custody without her consent during the Wassermans' divorce proceedings in 1977 and 1978. The district court dismissed the complaint for lack of subject-matter jurisdiction, describing the suit as a "dispute involving child custody," and thus within the domestic relations exception to federal diversity jurisdiction. We reverse and remand for further proceedings.

I. Background[1/]

Appellant Sylvia Wasserman is the former wife of appellee Irwin Wasserman. The Wassermans are the parents of four minor children. In addition to appellee Irwin Wasserman the complaint also named Irwin's present wife, his parents and the attorneys who represented him in the divorce and related proceedings during the periods relevant to the complaint.

On June 8, 1976, the Circuit Court for Montgomery County, Maryland, granted custody of the minor Wasserman children to appellant for the duration of the proceedings then underway. The final decree of divorce was eventually granted on June 8, 1978. On December 14, 1977, appellee Irwin Wasserman removed the three youngest children from appellant's custody (with the alleged knowing assistance of the other appellees) and took

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1/ For purposes of reviewing the motion to dismiss, we accept as true the facts as alleged in the complaint. Coles v. Havens Realty Corp., 633 F.2d 384, 386 (4th Cir. 1980), cert. granted, 101 S.Ct. 1972 (1981).

them outside the State of Maryland. From December 14, 1977 until March 9, 1978, the appellees allegedly prevented the children from returning to or contacting appellant and concealed their location from her. Appellant charged that these facts gave rise to three causes of action: child enticement; intentional infliction of emotional distress; and civil conspiracy.

Appellees filed motions to dismiss and supplemental motions to dismiss urging, among other grounds, that the district court lacked subject-matter jurisdiction because the suit involved domestic relations matters. After a hearing was held on these motions on May 11, 1981, the district court dismissed the suit by memorandum order dated May 12, 1981.

II. Discussion

As the district court correctly observed, the federal courts have long held that diversity jurisdiction does not include the power to grant divorces, determine alimony or support obligations, or determine child custody rights. See Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980); Wilkins v. Rogers, 581 F.2d 399, 403-04 (4th Cir. 1978). This doctrine, referred to as the domestic relations exception, is generally thought to originate in the dicta of two early Supreme Court cases, Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858), and Ex Parte Burrus, 136 U.S. 586 (1890). While the supposed origin and nature of the doctrine has not escaped exacting criticism, see, e.g., Solomon v. Solomon, 516 F.2d 1018, 1027 (3d Cir. 1975) (Gibbons, J., dissenting); Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y. 1968) (Weinstein, J.), it undoubtedly

survives as a limitation, in some form, on the exercise of diversity jurisdiction. Sutter v. Pitts, supra, 639 F.2d at 843; Phillips, Hizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973).

In this circuit application of the doctrine must be guided by the principles announced in Cole v. Cole, 633 F.2d 1083, 1087-89 (4th Cir. 1980). In Cole, a suit brought by the former husband against his ex-wife, the district court had dismissed claims of malicious prosecution and abuse of process, arson, conspiracy and conversion in the belief that the claims concerned matters of domestic relations. This court reversed, holding that:

> A district court may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged. . . . So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart.

633 F.2d at 1088-89. Examining the claims alleged by Mr. Cole, the court found the suit did not present any true domestic relations issues.

In so holding, the Cole court made the following observations: "The duty to abstain from malicious prosecution, from abuse of process, from arson, and from conversion does not arise out of or require. . . a present or prior family relation"; "deciding this case would not require the court either to adjust family status or to establish duties under family-relations law or to determine whether or not such duties had been breached"; "the claims asserted could have arisen between strangers, and certainly between people with no marital relationship whatever"; and the asserted causes of action "do not require the existence of any rule particularly

marital in nature as a substantial ingredient to give them vitality." Id.

Applying these considerations to the case at hand we believe Cole compels the district court to entertain this suit. Appellant's complaint alleges generally cognizable common law torts.[2/] As in Cole, the previous marital relationship of the parties and the presumably strong feelings associated with that relationship may as a factual matter have contributed to the underlying events and initiation of this suit; however, the torts of child enticement and intentional infliction of emotional distress are in no way dependent on a present or prior family relationship. Furthermore, prosecution of these torts will not require the existence of any rule particularly marital in nature. Similarly, these claims could have arisen between persons with no marital relationship whatsoever and in fact have done so in this case in view of the allegations relating to appellees other than Irwin Wasserman.

Most importantly, appellant is not seeking a determination of entitlement to custody or any other adjustment of family status. This is manifestly not a case in which the parties actually seek a declaration of present or future rights as to custody or visitation. Cf. Doe v. Doe, 660 F.2d 101 (4th Cir. 1981) (writ

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2/ We note only that child enticement and intentional infliction of emotional distress are generally cognizable torts. See generally Kajtazi v. Kajtazi, 488 F.Supp. 15, 18-21 (E.D.N.Y. 1978) (unlawful taking of child; intentional infliction of emotional distress); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977) (intentional infliction of emotional distress); McBride v. Magnuson, 282 Or. 433, 578 P.2d 1259 (1978) (taking of child); W. Prosser, Handbook of the Law of Torts § 124 at 893-84 (4th Ed. 1971) (child enticement); RESTATEMENT (SECOND) OF TORTS, § 700 (1979) (unlawful taking of child). At this stage, of course, we offer no opinion as to the sufficiency or merit of these claims.

of habeas corpus not available to contest child custody); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.), cert. denied, 414 U.S. 905 (1973); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967). The only genuine custody issue - whether appellant was entitled to custody for all times relevant to the complaint - was definitively determined by order of the Circuit Court of Montgomery County in June of 1976. Appellees concede the existence of that decree and suggest neither an intent to challenge it or any way the decree is susceptible of such challenge insofar as it stated the rights of the parties during the relevant time period. Accordingly, this case, unlike Hernstadt, does not involve a custody decree still subject to review and modification.

As the Cole court observed, federal courts have often exercised diversity jurisdiction to rule on the validity of prior state decrees or to determine the existence of a breach of duties established in such decrees, especially when the duties are no longer subject to modification. 633 F.2d at 1087; cf. id. at 1088 n.5. See also Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Keating v. Keating, 542 F.2d 910 (4th Cir. 1976). The court below will not have to make a significantly more intrusive inquiry into the domestic relations of these parties than required in those cases.

REVERSED and REMANDED

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NO. 81-2152

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OCTOBER TERM, 1981

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v.

SYLVIA WASSERMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR CERTIORARI

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No. 81-2152

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IRWIN WASSERMAN, et al.,
Petitioners

v.

SYLVIA WASSERMAN,
Respondent

MEMORANDUM OF MURRAY A. KIVITZ AND IRWIN H. LIPTZ IN RESPONSE TO PETITION FOR CERTIORARI

Respondents, Murray A. Kivitz and Irwin H. Liptz,* adopt, for purposes of this

*The parties to the proceeding before the Fourth Circuit were Sylvia Wasserman, Appellant, and Irwin Wasserman, Arlene Cornblatt Wasserman, Jacob Wasserman, Helen Ann Wasserman, Murray A. Kivitz, Irwin H. Liptz and Armand Robinson, Appellees. Murray A. Kivitz and Irwin H. Liptz are Respondents to the proceeding in this Court. Supreme Court Rule 19.6.

Memorandum, the following sections of the Petition for Certiorari: "Questions Presented," "Table of Authorities," "Opinions Below," "Jurisdiction" and "Statement of the Case."

ARGUMENT

The Petition for Certiorari should be granted in order to settle the present confusion in the circuits regarding the application of the "domestic relations" exception to the subject matter jurisdiction of the federal courts. (See Petition at 10-12). The Fourth Circuit, by attempting to distinguish certain domestic matters from others, labelling some intentional torts as torts not arising directly from the marital relationship, has confused what was a well settled area of the law and has put itself in conflict with the other circuits. For example, in an almost identical situation, the Southern District of New York dismissed for lack of

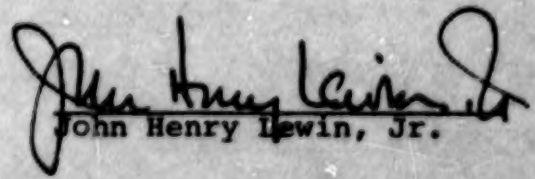
subject matter jurisdiction a complaint alleging false imprisonment and breach of a property and custody agreement since "the dispute between the parties, no matter how labelled, [was] essentially one arising with respect to . . . incidents of a matrimonial dispute." Kilduff v. Kilduff, 473 F.Supp. 873, 874 (S.D. N.Y. 1979) (emphasis added). See Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981) (claims for alienation of affection and intentional infliction of mental anguish "[grew] out of the dissolved but still stormy relationship of the parties"); Sutter v. Pitts, 639 F.2d 842, 844, (1st Cir. 1981), quoting, Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967), (civil rights action amounted to "nothing more than an 'attempt to embroil the federal courts in matrimonial matters best left to the states'"); Bacon v. Bacon, 365 F.Supp. 1019 (D. Ore. 1973) (action for intentional

infliction of mental anguish was actually a domestic relations case). Accordingly, Respondents agree that certiorari should be granted so that the question presented by the Petition may be authoritatively resolved.

CONCLUSION

For the foregoing reasons, Respondents support the position of Petitioners and urge that the Writ of Certiorari be issued.

Respectfully submitted,



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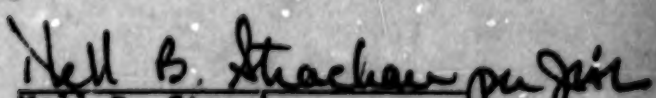

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No. 81-2152

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IRWIN WASSERMAN, et al.,

Petitioners,

v.

SYLVIA WASSERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR CERTIORARI

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No. 81-2152

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IRWIN WASSERMAN, et al.,

Petitioners

v.

SYLVIA WASSERMAN,

Respondent

MEMORANDUM OF SYLVIA WASSERMAN,
IN RESPONSE TO PETITION FOR CERTIORARI

QUESTION PRESENTED

Did the Fourth Circuit correctly hold that the trial court erred in dismissing this action for lack of subject matter jurisdiction based on the domestic relations exception to federal diversity jurisdiction where the action was solely for monetary damages arising from intentional torts and did not seek a determina-

tion of entitlement to custody, adjustment of family status or resolution of any true domestic relations claims.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals in this case appears at 671 F.2d 832 (4th Cir. 1982). The Memorandum Opinion of the District Court for the District of Maryland appears at page A-1 of the Appendix to the Petition for a Writ of Certiorari of Irwin Wasserman.

STATEMENT OF THE CASE

On July 30, 1980, Sylvia Wasserman sued Irwin Wasserman, Arlene Cornblatt Wasserman, Jacob Wasserman, Helen Ann Wasserman, Irwin Liptz, Armand Robinson and Murray Kivitz and the law partnership of Kivitz, Robinson and Liptz in an action stemming from the wrongful abduction of three of Mrs. Wasserman's children. The Complaint set forth three counts, child enticement, intentional infliction of emotional distress and civil conspiracy. The Complaint demanded compensatory and punitive damages. On May 12, 1981 the

District Court granted the Defendants' motions to dismiss for lack of subject matter jurisdiction. On February 24, 1982 the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded for the purpose of trial.

STATEMENT OF FACTS

The facts, as set forth in the Complaint and Election for Jury Trial, state that Sylvia Wasserman (Sylvia), is the former wife of Irwin Wasserman (Irwin). They are the parents of four minor children, Maia, Reana, Kyla and Liana. Arlene Cornblatt Wasserman (Arlene), is the present wife of Irwin, and Jacob Wasserman and Helen Ann Wasserman, are the parents of Irwin. Irwin Liptz, Armand Robinson and Murray Kivitz, and the partnership of Kivitz, Robinson and Liptz, were the attorneys of Irwin during the pertinent times and events which gave rise to this cause of action.

On June 8, 1976, by Decree of the Circuit Court for Montgomery County, Maryland,

Sylvia was granted custody of the minor Wasserman children during the pendency of the divorce proceedings between her and Irwin. The final Decree of Divorce between the parties was not granted until June 8, 1978.

On December 14, 1977, Irwin, without Sylvia's consent or knowledge, physically removed the three youngest children, Reana, Kyla and Liana, from Sylvia's custody, and, together with Arlene, with the knowing assistance of the other named Defendants, removed the children from the State of Maryland and traveled with them across the United States. During the period from December 14, 1977 to March 9, 1978, Irwin and Arlene, with the aid and assistance of the other Defendants, prevented the children from returning to Sylvia, concealed them from her, prevented them from contacting her regarding their location and well-being, and prevented her from locating and regaining custody of her children.

It is alleged that Irwin's motive for the abduction of his children was not one of love

or concern for the children, but rather, a strictly self-serving and avaricious one, the extorting of a favorable property settlement in the divorce proceedings from Sylvia as a ransom for the return of the children.

The suit does not ask for any revision of the property settlement, the custody decree, nor any aspect of the divorce proceedings in the Circuit Court for Montgomery County, Maryland. These domestic relation matters were adjudicated by that court and are not subjects of the Complaint.

The Complaint sets forth three causes of action, all intentional torts: (1) child enticement, (2) intentional infliction of emotional distress, and (3) civil conspiracy. The only relief requested is monetary in the nature of compensatory and punitive damages.

ARGUMENT

I. The holding of the Fourth Circuit that this action for monetary damages only based on intentional torts did not seek a determination of

entitlement to custody, adjustment of family status or any true domestic relations claims and thus did not fall within the domestic relations exception to federal diversity jurisdiction is not in conflict with the decisions of any other circuits since those decisions are clearly distinguishable and reconcilable with this case both factually and legally.

The case at bar is solely a tort action for monetary damages which does not seek any determination or revision of any domestic rights and which does not challenge the state court's prior divorce proceedings between these parties. It is not a domestic relations case and the domestic relations exception to federal diversity jurisdiction is neither apposite nor applicable.

Petitioners' argument that there is inconsistency between the Fourth Circuit's decision and decisions in the First, Third, Fifth, Sixth and Eighth Circuits completely ignores the factual and legal distinctions. Petitioners have taken the dicta in two early Supreme Court cases,

Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858), and In re Burrus, 136 U.S. 586 (1890), and erroneously have sought to apply it to all cases where the opposing parties happen to have been married regardless of the type of action brought or relief requested and have construed its application beyond the boundaries of subsequent decisional interpretations, all of which are unanimously in accord.

As the Fourth Circuit noted, "the federal courts have long held that diversity jurisdiction does not include the power to grant divorces, determine alimony or support obligations, or determine child custody rights," 671 F.2d 832, 834. Recognizing this and applying the guidelines espoused in Cole v. Cole, 633 F.2d 1083, 1087-89 (4th Cir. 1980) in interpreting the true nature of a potential domestic case, it distinguished the instant case as one alleging "generally cognizable common law torts" with none of the above proscribed domestic relations features. Specifically, it determined this

action (1) was "in no way dependent on present or prior family relations"; (2) "will not require the existence of any rule particularly marital in nature", (3) "could have arisen between persons with no marital relationship whatsoever and in fact [does so] in this case", (4) does not seek "a determination of entitlement to custody or any other adjustment to family status", (5) "does not involve a custody decree still subject to review and modification", (6) and will not require the court "to make a significantly . . . intrusive inquiry into the domestic relations of these parties."

The cases cited by Petitioner are unlike and distinguishable from the case at bar because they involve either the potential of inconsistency between state and federal adjudications or determinations of custody rights or collateral attacks on state divorce proceedings. All of these areas are clearly within the domestic relations exception and in no way contradictory to or in conflict with the

Wasserman case which is strictly a tort action for monetary damages. Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) was determined to be a claim, under the guise of a civil rights action, which the court found "boils down to a demand for custody of the child" with an "obvious likelihood of incompatible state and federal decrees". Likewise, in Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975), it was determined that federal jurisdiction over a non-support suit where there was pending state court litigation would "undermine" and "derrogate" the state court's jurisdiction. There is clear dicta in that opinion that a federal court "might well assume jurisdiction" where a separation agreement is involved where "the custody of no child was involved, in which there was neither pending state court action nor an agreement to litigate in the state courts, and in which there was no threat that a feuding couple would play one court system against another." Id. at 1025. Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) also

involves a possible encroachment upon a state court's findings in a divorce proceeding. Although, because of its brevity, it is difficult to determine the background of Gargallo, it is obvious that the federal claim alleging perjury in the divorce proceeding seeks to collaterally attack the state court's divorce proceeding. It is interesting to note that in a prior case involving the same parties, the Sixth Circuit also invoked the domestic relations exception where the dispute centered over a declaration of present and future rights as to custody. Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) cert. denied, 414 U.S. 805 (1973).

Overman v. United States, 563 F.2d 1287 (8th Cir. 1977), cited by Petitioners, also represents a case of attempted collateral attack of a state divorce decree in a federal forum. In remanding the case to the Missouri state courts, the federal court determined that this was merely an action brought by a spouse unhappy with a prior state adjudication, who sought "to

contest it by suing the government over a wage garnishment rather than challenging the divorce decree in an appropriate state forum". Id. at 1293.

Despite Petitioners' assertions to the contrary, the two Fifth Circuit decisions applying the domestic relations exception are not divergent holdings and, further, are in accord with the decisions in other circuits, including the Fourth. In Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) the Fifth Circuit acknowledged that despite the domestic nature of that case, it could exercise diversity jurisdiction over an action for alimony and child support arrearages in breach of a divorce decree. As authority for that holding, the court cited its prior decision in Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978), where it exercised jurisdiction in an action between former spouses for damages caused by breach of a voluntary separation agreement. The Fifth Circuit permitted the exercise of jurisdiction in Jagiella over the arrearage

issues even though questions of custody and parental rights were also raised, issues not present in Crouch. However, the court dismissed other actions brought, including a count for alienation of affections of the children, because a broader inquiry into the nature of this alleged tort action disclosed that it was merely "part of an ongoing series of disputes centering around the marital relationship". 647 F.2d at 565. Unlike Wasserman, the alleged tortious conduct in Jagiella arose from and was intertwined with a request to modify the divorce decree and visitation rights. Wasserman involves no such request for change in family status.

Since all of the alleged "inconsistent" cases cited by Petitioners are distinguishable factually and legally from the holding of the Fourth Circuit in Wasserman and since they are all reconcilable with that decision, there is no variance for this Court to reconcile. Further, there is no important issue of federal law ripe for review and settlement by this Court because

the domestic relations exception to federal jurisdiction is already well established and is inapplicable factually and legally to this case.

II. There is no important issue of federal law which is ripe for review and settlement by this Court because this decision is a routine exercise of diversity jurisdiction and does not usurp areas of law historically under exclusive state jurisdiction.

The decision below does not, as Petitioners contend, "usurp from the state one area of law historically under state jurisdiction". Pet. Brief at p. 12. State domestic relation courts, especially those in Maryland, do not and cannot grant the relief requested in this case. In Maryland, the domestic relations court sits as a court of equity, does not provide for a trial by jury and most importantly, cannot award monetary damages for tortious conduct involving estranged spouses. Petitioners' argument ignores the status and powers of the Maryland domestic

relations courts as well as the nature of the case and the type of relief requested. This case is not unlike myriads of other tort cases for monetary damages where diversity jurisdiction is routinely exercised.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opinion of the United States Court of Appeals for the Fourth Circuit, a Writ of Certiorari should not be granted.

Respectfully submitted,

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